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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 612

PAUL KAISER, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 295 *and* R. L. WEBB, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ..... *Petitioners*

v.

PRICE-FEWELL, INC. ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

EUGENE R. WARREN

BRUCE T. BULLION

1450 Tower Building
Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. .....

PAUL KAISER, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 295 *and* R. L. WEBB, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ..... *Petitioners*

v.

PRICE-FEWELL, INC. ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Arkansas of June 4, 1962, and the order of that Court denying rehearing September 10, 1962, which decision and order denying rehearing affirmed the decree of the Chancery Court of Pulaski County, Arkansas, entered December 5, 1961.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas sought to be reviewed here is officially reported in the Arkansas Law Reporter, Vol. 235, No. 5, dated June 4,

1962, at page 295. The opinion and dissenting opinion are set out as appendix "A" and "B" hereto. The order denying rehearing is set out at Appendix "D".

JURISDICTION

The final judgment of the Supreme Court of Arkansas was entered on September 10, 1962 (R. 187). The Supreme Court of Arkansas having affirmed a decree of the Chancery Court of Pulaski County, enjoining petitioners from peaceful picketing based upon a finding of illegality of purpose under interpretation of a State law in conflict with Federal interpretation and Federal statutes, the unconstitutionality thereof was asserted in Petitioners' Petition for Rehearing as reflected by Record 160-172.

The jurisdiction of this Court is invoked under Title 28, U. S. Code Section 1257 (3).

QUESTIONS SUBMITTED

May a State enjoin peaceful picketing under a State Labor Policy which is in conflict with the National Labor Policy?

Is the supremacy of Federal Law over conflicting State Law dependent upon proof of the amount of interstate commerce involved?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Amendment 14 to the Constitution of the United States and Article 6, Clause 2 of the Constitution of the United States and Amendment 34 of the Constitution of the State of Arkansas

STATEMENT OF THE CASE

Local Union 295 of the IBEW AFL-CIO entered into an area Contract with electrical contractors employing its members which area contract contained a referral system which is set out in detail in the opinion of the Supreme Court of Arkansas which is Appendix "A" to this petition. It was also agreed that no contract bearing dissimilar terms would be entered into with any other electrical contractor in the area. This collective bargaining agreement was formally executed between Local 295 and the Little Rock Chapter of the National Electrical Contractors Association. Fourteen of the twenty employees of respondent sought a collective bargaining agreement with respondent, which is an electrical contractor engaged in the electrical contracting business in the Little Rock — North Little Rock area. After preliminary negotiations, respondent declined to bargain further asserting that the referral agreement in the area contract was illegal under Arkansas law. A picket line was established by the employees after the abrupt termination of the bargaining session and the respondent obtained a State Court injunction enjoining the peaceful picketing on the grounds that the picketing was to enforce a contract in conflict with the Arkansas "freedom to work" amendment — Amendment 34. The injunction was upheld by the Supreme Court of Arkansas and petition for rehearing was denied.

ARGUMENT

This case presents a clear conflict between the National labor policy as announced by the Federal Courts and the State labor policy as announced by the State Courts. It, therefore, presents a question of the appropriate interpretation of the Supremacy Clause of the Constitution of the United States, Article 6, Clause 2. It has been recently stated by this Court that any State law, however clearly within the State's acknowledged power, which interferes with or is contrary with Federal Law, must yield. *Free* v. *Bland*, decided June 4, 1962, 8 L ed 2d 180, 82 S Ct.....: The petitioner's right to picket the job of the respondent is protected by the 14th Amendment to the Constitution of the United States. There is no question of mass picketing, threats or obstruction of streets and highways. The picketing did not threaten a probable breach of the State's peace nor was there any activity which would call for any police measures by either State of City authority. Picketing was peaceful and orderly. The sole basis for the State Court's injunction as affirmed by the State Supreme Court was that the picketing was for an illegal purpose in that the referral system contained in the area contract was illegal under Amendment 34 of the Constitution of the State of Arkansas. The referral system here indicted by the State Court is clearly declared legal under the Federal laws and under the National labor policy. *National Labor Relations Board* v. *Mountain Pacific Chapter of Associated General Contractors, et. al.* 270 Fed. 2d 425; *National Labor Relations Board* v. *Swinerton*, 202 Fed. 2d 511; *Eichleay Corp.* v. *National Labor Relations Board*, 206 F. 2d 799; *Morrison-Knudsen Company* v. *N. L. R. B.*, 276 F 2d 63.

The petitioner Local 295, finds itself in the untenable position of having one set of laws, rights and remedies applicable to one group of contractors with whom it does business and a contradicting set of rights and remedies applicable to other persons with whom it does business. Part of its members are given specific rights by Federal law while another part of its members have those rights denied to them by State law. In this situation the employees constitutional right of free speech is not dependent upon the guaranties of the Federal Constitution but upon the amount of Interstate Commerce done by his employer and the applicability of a State constitutional amendment in direct conflict with Federal interpretation of almost identical language in the National Labor Relations Act. It is clear that the dilemma here presented is within the language of this Court in *Garner v. Teamsters, C. & H. Union*, 346 US 485, 98 Led 228, 74 S Ct 161:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits."

Not only does the conflict between State and Federal labor policy justify the granting of this petition for certiorari, but also this Court has definitely removed the injunctive power from the State courts to restrain an

activity coming within the purview of the National Labor Relations Act. Amendment 34 of the Arkansas Constitution provides:

> "No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment."

The National Labor Relations Act, 29 U. S. C. A. 158 — (b) (2), provides that it is an unfair labor practice "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership".

29 U.S.C.A. 158 — (a) (3) provides: "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization".

The activity here enjoined by the State Court was peaceful picketing which the Court held to be for the purpose of forcing a contract to be signed which would cause the employer to discriminate against employees by reason of membership in the union and to force or encourage

union membership as a condition of employment. It is; therefore, clear that if the referral clause is illegal, notwithstanding the Federal Court decisions, then the activity here enjoined is clearly an unfair labor practice under the National Labor Relations Act and that the State Court has no authority to restrain the activity and that sole jurisdiction lies in the National Labor Relations Board. This Court is committed to the holding that a State has no power to deal with matters within the jurisdiction of the National Labor Relations Board even though that Board declines to exercise its jurisdiction. *Guss* v. *Utah L.R.B.*, 353 U. S. 1, 1 L ed 2nd 601, 77 S Ct 598; *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U. S. 20, 1 L ed. 2nd, 613, 77 Ct 604; *San Diego Building Trades Council* v. *Garmon*, 353 U. S. 26, 1 L ed 2nd 618, 77 S Ct 607.

There is no contention here or elsewhere that jurisdiction for this area of labor relations has been ceded by the National Relations Board to State authority.

It being quite clear under the decisions of this Court that the National Labor Relations Act is supreme in those areas of labor conflict covered by its terms, the question is then presented — is the supremacy of Federal law over conflicting State law dependent upon proof of the amount of interstate commerce involved? The decisions just cited state unmistakably that the assumption of jurisdiction by the National Labor Relations Board is not the controlling point in determinging applicability of the Federal law. This being true, is it necessary that any interstate commerce be proven by the parties enjoined from an activity clearly covered by the National Act? The employer has sole possession of his books reflecting the amount of business done by him in interstate commerce. Economic demands upon employees make it im-

practical to place upon them the burden of prior proof of evidence solely in the possession of the employer before they are free to pursue their right of peaceful picketing, legal under Federal law, but declared illegal under State law. It is submitted that since a jurisdictional amount has been expressly discarded by this Court as a requirement for the applicability of the National Labor Policy, as reflected by the National Labor Relations Act, then proof of the amount of business in interstate commerce is not a prerequisite to draw into position the protection the National Labor Policy affords to employees.

CONCLUSION

For the foregoing reason, it is respectfully presented that substantial questions of constitutional consideration are involved. The issues are of wide public concern. For these reasons, this petition for writ of certiorari should be granted.

EUGENE R. WARREN

BRUCE T. BULLION

1450 Tower Building
Little Rock, Arkansas

Attorneys for Petitioners

APPENDIX "A"

SUPREME COURT OF ARKANSAS

PAUL KAISER, INDIVIDUALLY AND REPRESENTATIVE OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 295 AND R. L. WEBB, INDIVIDUALLY AND AS REPRESENTATIVE OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Appellants	No. 2671 Opinion Delivered Appeal from Pulaski Chancery Court, Second Division; Hon. Guy E. Williams, Chancellor.
V.	MODIFIED
PRICE-FEWELL, INC. Appellees.	AND AFFIRMED

JIM JOHNSON, Associate Justice

This appeal questions the validity of an injunction against picketing in a labor dispute in North Little Rock. Appellants urge that members of the International Brotherhood of Electrical Workers, Local 295, have been denied their right of peaceful picketing pursuant to a strike directed against appellee. The Chancellor granted the injunction on the ground that the Union was picketing for unlawful objectives, first, to obtain a contract with appellee which contains a hiring hall arrangement, and second for a closed shop. Both of these objectives were found to violate Amendment 34 to the Arkansas Constitution and act 101 of the Acts of 1947, which is the enabling act for enforcement of Amendment 34.

Suit for injunction was brought by appellee, Price-Fewell, Inc., against Paul Kaiser, individually and as

Representative of International Brotherhood of Electrical Workers, Local 295, and R. L. Webb who is the International Representative of the Electrical Workers.

In September 1961, representatives of the union served notice on appellee that they represented a majority of its employees and requested that appellee negotiate a collective bargaining agreement with the union. Appellee refused and thereafter 14 of its employees went out on strike. The parties then commenced negotiations and several conferences were held. At one of the conferences the union presented appellee with a proposed basic contract, part of which was a contract termed "Inside Agreement". This agreement was executed by this union and members of the Ark. Chapter, National Electrical Contractors Association. Article V thereof sets forth a job referral procedure as follows:

> "In the interest of maintaining an efficient system of production in the industry providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment.
>
> "1. The Union shall be the sole and exclusive source of referrals of applicants for employment.
>
> "2. The Employer shall have the right to reject any applicant for employment.
>
> "3. The union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or

any other aspect of obligation of union membership policies or requirements. All such selections and referral shall be in accordance with the following procedure.

"4. The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. Each applicant for employment shall be registered in the highest priority group for which he qualifies.

"GROUP I: All applicants for employment who have four (4) or more years experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted local Union of the I.B.E.W. and who have been employed for a period of at least one (1) year in the last four (4) years under a collective bargaining agreement between the parties to this Agreement.

"GROUP II: All applicants for employment who have four (4) or more years' experience in the trade and who have passed a journeyman's examination given by a duly constituted Local Union of the I.B.E.W.

"GROUP III: All applicants for employment who have two (2) or more years, experience in the trade, are residents of the geographical area constituting the normal construction labor market and who have been employed for at least six (6) months in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.

"GROUP IV: All applicants for employment who have worked at the trade for more than one (1) year.

"If the registration list is exhausted and the Union is unable to refer applicants for employment

to the Employer within forty-eight (48) hours from the time of receiving the Employer's request, Saturdays, Sundays and Holidays excepted, the Employer shall be free to secure applicants without using the referral procedure, but such applicants if hired, shall have the status of 'temporary employees'. The Employer shall notify the Business Manager promptly of the names and Social Security number of such 'temporary employees', and shall replace such 'temporary employees' as soon as registered applicants for employment are available under the referral procedure."

Appellants contend there was no insistence on the part of union negotiators that the referral procedure be incorporated in the basic contract offered appellee. Also, that in any event appellee did not refuse to sign the proposed contract because of the referral procedure, but rather because appellee performed work for non-union general contractors and union organization would prevent appellee from doing business with such contractors. Although the evidence is conflicting on these issues, Mr. R. L. Webb, International Representative of the union, did testify that the referral procedure was a part of the basic contract presented to appellee. As previously pointed out, this same contract has been executed by the Arkansas Chapter of National Electrical Contractors Association and Article III, Section 7-b thereof prevents this union from granting other contractors more favorable terms than those granted to Association members. Section 7-B reads as follows:

"The union agrees that if, during the life of this Agreement, it grants to any Employer in the Electrical Contracting Industry any better terms or conditions than those set forth in this Agreement, such better terms or conditions shall be made avail-

> able to the Employers under this Agreement and the Union shall notify in writing, the Employer of any such concessions * * * ."

Section 81-203 Ark. Stats. of 1947, Annotated (Section 3 of Act 101 of 1947) the enabling act for enforcement of Amendment 34 provides as follows:

> "81-203. Certain Contracts prohibited. — No person, group of persons, firm, corporation, association, or labor organization shall enter into any contract to exclude from employment (1) persons who are members of, or affiliated with, a labor union; (2) persons who are not members of, or who fail or refuse to join or affiliate with, a labor union; and (3) persons who, having joined a labor union, have resigned their membership therein or have been discharged, expelled, or excluded therefrom."

If an objective of the picketing was to force appellee to execute a contract which has the effect of excluding employees from employment or excluding applicants for such employment because of their refusal to join or affiliate with a labor union, then such picketing violates Amendment 34. On the other hand, if the picket line was established in furtherance of a lawful strike, certainly no objections could be raised because employees in the exercise of free speech had the right to advise the public of their dispute with appellee. Traditionally, one of the objectives of union organization is to obtain higher wages and better working conditions. However, it is the duty of the Court to construe the contract in the light of the evidence adduced and since the voters of Arkansas have seen fit to adopt Amendment 34 and the Legislature enacted Act 101 of 1947 allegedly to prevent discrimination because of failure to join or affiliate with a labor organization, the Court has no alternative but to apply these measures in accordance with the intention thereof.

The Chancellor interpreted the statute as applying not only to persons who are not members of a labor union but also persons who fail or refuse to affiliate with a labor union. We cannot disagree with this interpretation. The statute reads in part: "* * * or who fail or refuse to *join*, or *affiliate with* a labor union, * * *." The word "affiliate" apparently is not used here in the same sense as the word "join". This is made even more plain by the wording in the statute immediately prior to the above language, which is: "(1) persons who are *members of*, or *affiliated with* a "labor union." In the absence of a showing that a union apprentice or the like is any less a union member than a union journeyman, it clearly appears that the General Assembly did not intend that the word affiliate should have the same meaning as join or to become a member of, otherwise the two words would not have been used in the same sentence. It is a well known principle of statutory construction that words must be construed according to their usually accepted meaning in common language, "for this is the sense in which they must be supposed to have been used by the Legislature." *Hancock* v. *State*, 97 Ark. 38. Consequently, if the referral procedure has the effect of excluding persons from employment who fail or refuse to affiliate with a labor union, then Amendment 34 and Act 101 are violated.

Applying this reasoning to Article V of the proposed agreement, we find that Paragraph 1 makes the union the sole and exclusive source of referrals and Paragraph 4 requires that a register of applicants be maintained at the union hall. This means that before a person can be employed by appellee, such person would have to go to the union hall and place his name upon the register. In doing so he is to this extent affiliating himself with the union

because the union is the only source to look to for employment. This affiliation goes even further because such persons must also meet the conditions set forth in the various groupings before they can be considered for referral. One condition is that before a person can get into Group II he must have passed a journeyman's examination given by a duly constituted local union of the International Union. Certainly he would have to further affiliate with the union in order to take this examination.

It is common knowledge that in the construction industry a contractor's work is intermittent. He moves from job to job and between jobs must lay off experienced personnel, many of whom may have worked for him for years as faithful and efficient employees. When a new job is started, this hiring hall arrangement would prevent the contractor from calling these employees directly and requesting them to come back to work. He would be required to call the union hall instead and these faithful employees would be forced to take their place on this referral list along with all the other applicants. They may or may not be referred back to the job with their old employer. In this manner the referral procedure would destroy the very thing that employees traditionally have sought and this is the job security. Job security, seniority with an employer, tenure of employment, or by whatever other terminology described or defined, it must be conceded that Amendment No. 34 and Act 101 of 1947, guarantee to the individual worker the opportunity to firmly establish himself in a job without submitting to any form of control outside of the normal relationship of employee and employer. This an employee could not do under the proposed contract here questioned. This right of an employee is, or at least should be, just as sacred to a union member as it is to a non-member. Under the proposed contract, union members' lawful rights (as here outlined)

would suffer the same disruption and destruction as would be inflicted upon the non-members. The arrangement here in question therefore appears to be nothing more than an intricate web set up whereby the union can control employment. This control would be exclusive except for the employer's privilege of rejection. The employer would be subjected to work stoppage based upon breach of contract if he should permanently hire his brother without first referring him through the union hiring hall. No longer could public or private employment agencies or, for that matter, competing unions refer persons directly to an employer for employment. Surely, as argued by appellants, hiring halls maintained by building and construction trade unions could and, no doubt do, serve a beneficial purpose not only for their trades but for the entire industry, and, certainly, they have a perfect right to offer this service, however, to demand by the use of the most powerful weapon at their command (i.e. strike and picket), the right, in effect, to control employment to the exclusion of all others, including the employer, is a service some employees and employers might not be inclined to cherrish.

It is well settled in this jurisdiction that picketing to obtain an unlawful objection is grounds for an injunction. In *International Association of Machinists, A.F.L. Local* 924 v. *Goff-McNair Co.*, 223 Ark. 30, this Court said:

> "On the other hand this Court has held that the demand by a union that a collective bargaining agreement contain a provision in violation of Amendment 34 to Constitution and Act 101 of 1947, coupled with picketing in an attempt to enforce such demand, is grounds for the issuance of an injunction prohibiting such picketing. Self v. Taylor, 217 Ark. 953, 235 S.W. 2nd 45; Local No. 802 v. Asimos, 216 Ark. 594, 227 S.W. 2nd 154;

Lion Oil Company v. Marsh, 220 Ark. 678, 249 S.W. 2nd 569. See also Giboney v. Empire Storage & Ice Company, 336 U.S. 490, 69 S. Ct. 694, 93 L. Ed. 834."

In *Self* v. *Taylor*, 217 Ark. 953, this Court had occasion to deal with an agreement that was found to violate Amendment 34 due to the Union's announced intention to cancel the contract under a sixty-day notice clause if the employer hired non-union men. The Court then said:

> "It was the object of the defendants, in submitting this contract, to compel the plaintiff to operate a closed shop business. He could not afford to sign such a contract, under the laws of the State of Arkansas, because if he permitted union men to work for him he would have to violate the law and dismiss employees because they were not employees of the union. It is an ingenious scheme, but it did not work."

The same principal is applicable here. If appellee had signed the contract, any person thereafter seeking employment with the appellee would either have to join the union or become affiliated with it. The proposed agreement clearly would allow appellants to do by indirection exactly that which they are prohibited by law from doing directly.

It follows, therefore, that under Amendment 34 to the Constitution which was adopted by the electors of Arkansas in 1944, under the enabling statute for this amendment (Act 101 of 1947, Sec. 81-201, *et. seq.*, Ark. Stats. 1947) and the decision of this Court construing these measures, we have no choice but to affirm the Chancellor's finding that the hiring hall arrangement sought by the union is prohibited by the Constitution and laws of this State. To hold otherwise would substitute our will, by Court decree,

for the expressed will of the legislature and the people and render nugatory a portion of our constitution without authority. Having so determined, we find it unnecessary to reach the issues pertaining to a closed shop.

Accordingly, the injunction granted by the Chancellor herein is affirmed insofar as it prohibits the appellants and those cooperating with them from picketing for the purpose of obtaining a contract containing the matters found objectionable in this opinion. See *Youngdahl* v. *Rainfair*, 355 U. S. 131, 2 L. Ed. 2nd 151, 78 S. Ct. 206.

The Chief Justice, Justice George Rose Smith and Justice Paul Ward dissent.

APPENDIX "B"

SUPREME COURT OF ARKANSAS

No. 5-2671

PAUL KAISER et al., Appellants,
v.
PRICE-FEWELL, INC. Appellee.

Opinion Delivered June 4, 1962.

Dissenting opinion.

GEORGE ROSE SMITH, Associate Justice

GEORGE ROSE SMITH, J., dissenting. In the construction industry a contractor must utilize the skills of many specialized craftsmen, such as bricklayers, concrete finishers, plumbers, electricians, painters, roofers, etc., but most of them work upon a particular job for only a few days or even a few hours. It is plain enough that a small contractor cannot maintain upon his payroll, as full-time

employees, all these specialists. Hence it is desirable that some central labor pool be maintained, so that each contractor can call for the various skilled workmen as he needs them. Such an arrangement is not only advantageous to the contractors; it also affords the workmen access to whatever jobs are available in their field. Hence the hiring hall fills a definite need in the building industry. According to this record, the electrical workers' union maintains the only existing hiring hall in this craft in Pulaski county. No other agency, public or private, has undertaken to perform this necessary function in the construction business.

The union sought to include in its labor contract a provision for the recognition and continued existence of this hiring hall. The contract was fair on its face, in that it permitted the employer to reject any applicant for employment. Certainly the proposed contract met the standards suggested for such agreements in *National Labor Rel. Board* v. *Mountain Pac. Chap. of Assoc. Gen. Contractors*, 9th Cir., 270 F. 2d 425.

It is obviously possible that the hiring hall might be conducted with discrimination, so that non-union electricians would not be given equal opportunities for employment. But this record contains not a sentence, not a word, not a syllable, of testimony to show that this hiring hall is to be used as an instrument of discrimination. I am very much afraid that the effect of the majority opinion is to outlaw the hiring hall, a useful device, in all instances, even though the terms of the proposed contract appear to be wholly fair and nondiscriminatory. For these reasons I would reverse the decree.

APPENDIX "C"

IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1961 JUNE 4, 1962

PAUL KAISER et al — APPELLANTS

v. Appeal from Pulaski Chancery Court, Second Division

PRICE-FEWELL, INC. — APPELLEE

JUDGMENT

This cause came on to be heard upon the transcript of the record of the Chancery Court of Pulaski County, Second Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that the decree of said Chancery Court in this cause rendered should be modified as set out in the opinion herein delivered, and as modified, affirmed.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause be modified as provided in the opinion herein delivered, and as modified, be, and it is hereby, affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof. HARRIS, C. J., and GEORGE ROSE SMITH AND WARD, JJ., dissent.

June 4, 1962

APPENDIX "D"

IN THE SUPREME COURT OF ARKANSAS

OCTOBER TERM 1961

Proceedings of September 10, 1962

PAUL KAISER ET AL — APPELLANTS

v. No. 5-2671

PRICE-FEWELL, INC. — APPELLEE

ORDER

Rehearing denied.

September 10, 1962

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v.

PRICE-FEWELL, INC. ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAT MEHAFFY
B. S. CLARK
W. H. SUTTON
Attorneys for Respondent
1100 B yle Building
Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

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CONSTITUTIONAL PROVISIONS

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Chancellor is unreported but is contained at page 19 of the certified transcript. The opinion of the Supreme Court of Arkansas is reported in The Law Reporter, Vol. 235, No. 5, dated June 4, 1962, 359 S.W. 2d 449.

JURISDICTION

The judgment of the Supreme Court of Arkansas, Court of last resort of the State, was rendered June 4, 1962. A Petition for rehearing was denied on September 10, 1962. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257(3).

QUESTIONS SUBMITTED

Petitioners set out the questions submitted as follows:

> May a State enjoin peaceful picketing under a State Labor Policy which is in conflict with the National Labor Policy?
>
> Is the supremacy of Federal Law over conflicting State Law dependent upon proof of the amount of interstate commerce involved?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the Constitution of the United States, Article 6, Clause 2 of the Constitution of the United States, and Amendment No. 34 of the Constitution of the State of Arkansas.

STATUTES INVOLVED

The Arkansas statutory provisions involved are set forth in Section 81-203, *et seq.*, Arkansas Statutes of 1947 Annotated.

STATEMENT

This litigation resulted from an attempt by Local Union 295 International Brotherhood of Electrical Workers, AFL-CIO, to organize the employees of Respondent and to execute a collective bargaining agreement with

respect to such employees. Bargaining conferences were held between the parties but an impasse was reached when respondent refused to accept an exclusive referral system pertaining to employees contained in an area contract presented by the Union. The area contract was identical to a contract which the Union had in effect with the Little Rock Chapter of the National Electrical Contractors Association. Respondent was not and is not now, a member of such Association.

When Respondent refused to accept the contract, a picket line was established by the Union, the purpose of which was to force Respondent into signing the contract. Respondent filed its complaint in Chancery Court seeking injunctive relief and set forth that the exclusive referral system in the contract was prohibited by Amendment No. 34 of the Constitution of the State of Arkansas (Right to Work Law), and the picketing was therefore designed to force Respondent into committing an unlawful act. A temporary restraining order was issued and thereafter made permanent by the Chancellor on December 5, 1961.

Significantly, at no time during any of the proceedings herein did petitioners claim that the State Court did not have jurisdiction over this matter. Furthermore, on appeal to the Supreme Court of Arkansas petitioners did not raise federal constitutional questions until their petition for rehearing. Consequently, the Trial Court was not given an opportunity to pass on the question of federal jurisdiction and the Supreme Court of Arkansas was not given the opportunity to pass on the constitutional questions now presented.

ARGUMENT

I

THE FEDERAL QUESTIONS WERE NOT RAISED IN NOR PASSED ON BY THE STATE COURT.

If is settled law that when as here, any right, privilege or immunity is set up or claimed under the Constitution as grounds for the granting of a writ of certiorari, the claim must be first asserted in the State Court at the proper time and in the proper manner under the State system of pleading and practice. *Hartford Ls Ins. Co. v. Johnson*, 249 U.S. 490, 63 L. Ed. 722, 39 S. Ct. 336. At no point in the proceedings in the State Courts did petitioners bring such a claim to the Court's attention in a manner adequate to apprize the Court that there was before it a claim founded on Federal law, nor did the Arkansas Court at any point find it necessary to pass upon a Federal question. The first time any constitutional question was raised was in the Petition for rehearing filed with the Supreme Court of Arkansas. It was there asserted that the Supreme Court's decision contravened freedoms granted by Amendments 1 and 14 of the Constitution of the United States and also Article 6, Clause 2, of the Constitution of the United States. This Court held in *Herndon v. Georgia*, 295 U.S. 441, 79 L. Ed. 1520, 55 S. Ct. 794, that it is too late to first assert a federal claim in a petition for rehearing to a State Court.

Reproduced as Appendix "A" to this brief is petitioner's statement of Points to be Relied Upon from their original brief in the Supreme Court of Arkansas, indicating the total absence of any federal claim. Reproduced

as Appendix "B" to this brief is petitioner's answer filed in the Trial Court indicating the total absence of any federal claim raised at that level.

Thus we have a situation where petitioners seek for the first time on appeal to assert federal questions. They assert this matter by claiming that the decision of the Supreme Court of Arkansas contravened the Constitution of the United States. We hasten to point out that the decision of the Supreme Court of Arkansas merely affirmed the decision of the Chancellor and for this reason Petitioners had every opportunity to present these very same constitutional questions to the Supreme Court of Arkansas on appeal. Since they failed to do so, this Court is without jurisdiction to grant a writ of certiorari.

II

THE FEDERAL QUESTIONS PRESENTED HAVE BEEN DECIDED BY THIS COURT ADVERSELY TO PETITIONER'S POSITION.

Prior to the 1959 Amendments to the National Labor Relations Act, a great deal of uncertainty existed with respect to areas in which State Courts could exercise jurisdiction. For many years this question remained undecided and disputed. For example, in 1947 this Court in *Bethlehem Steel Co. v. New York Labor Board*, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026, expressly refrained from deciding the question saying that "the election of the National Labor Relations Board to decline jurisdiction in certain types of cases, for budgetary and other reasons, presents a difficult problem which we do not now decide". In 1957 this Court in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 1 L. Ed. 2d 601, 77

S. Ct. 398 held that the NLRA completely displaced State power even in cases which the Board had declined, and there recognized the ramifications of its holdings. The Court suggested that the solution lay within the halls of Congress.

In 1959 the NLRA was amended by Congress and Section 14(c)(2) of the Act now expressly authorizes states to act in cases where jurisdiction is not assumed by the Board. Section 14(c)(2) reads as follows:

> "(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to a paragraph (1) of this subsection, to assert jurisdiction."

The issue of federal jurisdiction was not raised in this case in the Trial Court nor was it raised on appeal. No determination has been made as to whether the activities of respondent even "affect" interstate commerce. Since the jurisdictional question was not raised, the prior decisions of this Court are clear that the State Courts are free to act in accordance with State labor policies.

CONCLUSION

The decision of the Supreme Court of Arkansas is correct and the federal questions presented were not raised in nor passed on by the State Courts. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

PAT MEHAFFY

B. S. CLARK

W. H. SUTTON

Attorneys for Respondent

1100 Boyle Building
Little Rock, Arkansas

December, 1962.

APPENDIX "A"

POINTS TO BE RELIED UPON

I

THE REFERRAL PROCEDURE DOES NOT CONFLICT WITH AMENDMENT 34.

II

THE COURT ERRED IN APPLYING THE DECISION OF SELF v. TAYLOR TO THE CASE AT BAR.

III

THE COURT ERRED IN HOLDING THAT THE PICKET LINE WAS NOT IN PURSUANCE OF THE STRIKE.

APPENDIX "B"

1.

Defendants Admit the Allegations in Paragraph 1 of the Plaintiff's Complaint.

2.

Defendants admit that Paul Kyzer is an officer and authorized representative of International Brotherhood of Electrical Workers, Local 295, a voluntary unincorporated labor organization with offices in Little Rock, Arkansas. The defendants further admit that R. L. Webb is the International Representative of the International Brotherhood of Electrical Workers, a voluntary unincorporated labor organization with headquarters in Washington, D. C. Defendant R. L. Webb denies that this court has jurisdiction over the International Brotherhood of Electrical Workers and that the International Brotherhood of Electrical Workers is properly a party thereto.

3.

Defendant R. L. Webb denies that neither he nor the International Brotherhood of Electrical Workers committed any of the acts alleged in the said complaint.

4.

Defendant Paul Kyzer admits that Local 295 of the International Brotherhood of Electrical Workers has placed pickets on the work being done by plaintiff at the Rose City Shopping Center in North Little Rock, Arkansas; denies that said pickets were wrongfully placed upon said job, but states that said pickets were placed upon

said job in the furtherance of a legal and proper strike of the employees of the plaintiffs and in furtherance of the constitutional right of said employees to inform the public of their labor dispute with said Price-Fewell, Inc. Defendants state that said pickets were peaceful and legal and that said picketing was for the purpose of informing the public that said plaintiff would not recognize the expressed desire of a majority of the employees of said plaintiff that Local 295 I. B. E. W. be recognized as the bargaining agent for said union employees.

5.

Defendants state that the pickets bore signs informing the public that the electric contractor on the particular job was unfair to members of Local Union 295 of I. B. E. W. The said sign specifically stated "this picket is not for a 'closed shop or a union shop'." Defendants deny the allegations of paragraph 4 of the plaintiff's Complaint and deny that said pickets were for any unlawful purpose or for the purpose of compelling the plaintiff to employ certain members of the union; that the plaintiff had previously recognized that a majority of its employees had authorized local 295 to represent them as their bargaining agent for the purpose of executing a contract with the plaintiff specifying wages and working conditions and that the plaintiff in the midst of negotiations for such contract refused to negotiate further and declined to execute a contract or working agreement asserting that its association with third parties prevented its execution of said working agreement. Defendants state that at no time was the plaintiff asked or urged to

employ any members of the union but that a majority of its employees were affiliated with Local 295, I. B. E. W. which fact was recognized by the plaintiff.

6.

The defendants deny the allegations in paragraph 5 of the plaintiff's complaint.

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No. 612

IN THE

SUPREME COURT OF THE UNITED STATES

PAUL KAISER, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 295 *and* R. L. WEBB, *Individually and as Representative of* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS ..... *Petitioners*

v.

PRICE-FEWELL, INC. ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

EUGENE R. WARREN

BRUCE T. BULLION

Attorneys for Petitioners

1450 Tower Building

Little Rock, Arkansas

PARAGON PRINTING CO., LITTLE ROCK

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Respondent seeks to avoid certiorari by asserting that Federal questions were not raised in the State Court. This argument is made notwithstanding that the record reflects that the Motion to Dissolve Restraining Order filed contemporaneously with the Answer in the trial court states "the pickets enjoined and restrained by said restraining order are legal pickets asserting their constitutional right of free speech" and the statement in the Answer that the pickets were "in furtherance of the

constitutional right of said employees to inform the public of their labor dispute". The constitutional guaranties asserted in the trial court were necessarily the guaranties of freedom of speech by the Federal Constitution.

The question submitted here is primarily concerned with the supremacy of Federal law over State law as interpreted for the first time by the State Supreme Court. Until the State Supreme Court interprets a State Statute or State Law, in a manner conflicting the Federal Law the supremacy clause of the Federal Constitution cannot be invoked. Under these circumstances, the supremacy clause may appropriately be raised for the first time in a petition for rehearing in the State Supreme Court. Where a State statute is adjudged to mean one thing for some cases and another thing for others, the objection cannot be made in advance of the event. *Great Northern R. Co. v. Sunburst Oil & Refining Co.* 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360.

On November 21, 1962, this Honorable Court granted certiorari in the case of *Retail Clerks' Local 1625 v. Schermerhorn* No. 368 on this Court's docket. The question in that case is whether Section 14(b) of the National Labor Relations Act authorizes States to prohibit and regulate agency shop agreements which do not require "membership" in labor unions. One of the questions in the present case is whether Arkansas Right to Work Laws, as interpreted by the Arkansas Supreme Court, exceeds the authority granted to the States under Section 14(b) to ban or regulate agreements requiring "membership" in a labor organization. The Arkansas interpretation bans affiliation which petitioner asserts is beyond the power of the State of Arkansas under Section 14(b).

It should be noted that certiorari was not granted in Schermerhorn until the present petition for certiorari was in transit to the Court.

Respectfully submitted,

EUGENE R. WARREN

BRUCE T. BULLION

Attorneys for Petitioners

1405 Tower Building
Little Rock, Arkansas